APPENDIX A.

Memorandum from Supreme Court of Mississippi for Additional Briefs.

IN THE SUPREME COURT OF MISSISSIPPI.

No. 33,989.

J. W. Sanders Cotton Mill vs. Lula Moody. Division A: *Per Curiam.*

MEMO. FOR ADDITIONAL BRIEFS.

The record in this case, every page of it, has been carefully read and parts of it in conference. The briefs have been read more than once. The examination, so far made, has left the impression that a considerable part of that brought out by plaintiff either on direct or on cross-examination had no substantial relevancy to the precise issues which should have been tried by the court and to which the evidence should have been confined; namely (1), had the employer neglected to use reasonable care to make the machine reasonably safe in respect to the clearer board and in the particular respect specified in the declaration and in appellee's own testimony, she being admittedly the only person who saw the accident, and was such particular negligence, if any, the proximate or a proximately contributing cause of an injury to plaintiff, as one likely to happen; and (2) the true extent of the injury or injuries thereby caused, not including those caused by or resulting from something else, if anything else.

We shall not undertake to group or classify what seems to us at the present time to be irrelevant testimony; but it would seem that it might be grouped under about four classifications, only one of which we shall here mention. It seems to us, for instance, that the testimony repeated

again and again in various forms about the long hours of labor, and the constant activity required in those hours had no place as respect the true issues above stated, and, as at present advised, it seems to us that the climax of the incompetency and harmful irrelevancy was reached in the examination on pp. 295, 296 about the so-called stretch-out system.

The pages just cited are selected for the further purpose of calling attention to the fact that at that particular point no objection was made by the defendant. But the rule is that if the principle involved on an objection to evidence be once decided against a party, he will not be required to object when thereafter evidence involving the same principle is again brought forth. *Herrin* v. *Daly*, 80 Miss. at p. 340. Had not the defendant sufficiently raised the objection at a previous point or points in the record? If so, precisely on what page or pages of the record? And so on throughout.

Counsel for appellant has not attempted to group or classify the testimony claimed by him to be incompetent, and has not pointed out all the pages in the record where such incompetent testimony as grouped appears; and if incompetent testimony has been repeated without an objection interposed at that particular point, he has not shown where at a preceding page or pages the objection presenting the principle involved was made, if any such preceding objection was made.

Counsel for appellant labors under the impression, as disclosed by the closing expression in his principal brief, that he was due an apology to the Court for a brief of 44 pages, while counsel for appellee has, without apology, presented a brief of 124 pages, every page of which is welcomed by the Court. We have endeavored in various ways to make it known to the bar of the State that we do not object to long briefs, but, on the contrary, insist on them when necessary to a presentation of all the contentions of counsel which he deems material to his case.

We have repeatedly called for additional briefs that this may be understood; and we are doing so now in this case.

All will agree that it is the constitutional duty of courts to see that all litigants, whether plaintiffs or or defendants, are given what may be designated under the general term fair trials. If incompetent or irrelevant testimony is admitted, the effect of which is to lead the jury away from the real issues and to prejudice them against one or the other party, then this question is the first to which the court should look because every case must be so tried that the jury shall be fair and impartial not only at the beginning, but must be allowed to remain so even to the end.

An additional and full brief is requested from appellant on the questions of incompetent, irrelevant or immaterial testimony in this case,- keeping in mind that the Court has not decided but only has an impression that there is such testimony of a harmful nature in this case, which if established under the law is cumulative in its effect, to which appellee is to have full opportunity to reply in defense of all or any part of such testimony.

It is requested that appellant file its brief confined to questions stated herein, on or before three weeks from this date, to which appellee will reply in two weeks thereafter, and appellant a rejoinder in one week. Counsel may extend the time by agreement, save that we would prefer that the briefs be all completed not later than May 4 next, in view of our approaching adjournment on or about June 10th.

Issued this March 7, 1940.

(If counsel should extend the time by agreement as allowed under the foregoing concluding paragraph, it ought to be in writing, filed with the Supreme Court Clerk.)

APPENDIX B.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942

No. .....

THOMAS HENRY TROTT, PETITIONER

vs.

McDONOUGH MOTOR EXPRESS COMPANY, INC., A CORPORATION, ET AL, RESPONDENTS

Brief and Argument in Support of Petition for Certiorari.

HORACE C. WILKINSON
Counsel for Petitioner

INDEX

Points of Law 49
Point A 49
Point B 49
Point C 49

Argument 49
Procedural due process 50
Duty of court to protect suitors 51
False charge that Trott paid McDonough 51
The right to verdict uninfluenced by extraneous matters 53
False charge that Trott's employer was sponsoring litigation to get out of paying compensation 53
False charge that Trott could get his hospital bill without a suit 54
The record of ineffectual appeals for corrective action 55
Improper purpose only explanation 61

TABLE OF CASES CITED

Berger v. U. S., 295 U. S. 78 ..... 49, 61
Blair v. U. S., 241 Fed. 217 ..... 49, 53
Brasfield v. U. S., 272 U. S. 310 ..... 49, 50
Frank v. Mangrum, 237 U. S. 309 ..... 49, 50
Kelly v. State, 113 Miss. 856 ..... 49, 53
London Guarantee & Acc. Co. v. Woelfe, 83 F. 2d 325 ..... 49, 50
Moore v. Dempsey, 261 U. S. 86 ..... 49, 50
N. Y. C. R. R. Co. v. Johnson, 279 U. S. 310 ..... 49, 50, 53
Pearce v. U. S., 295 U. S. 78 ..... 49, 60
Pettine v. New Mexico, 201 Fed. 489 ..... 49, 53
Powell v. Alabama, 287 U. S. 45 ..... 49, 50
Snyder v. Mass., 291 U. S. 137 49
Standridge v. Martin, 203 Ala. 486 ..... 49, 53

Points of Law.

A

Procedural due process is not satisfied though the result is just if the hearing was unfair.

Powell v. *Alabama*, 287 U. S. 45
Moore v. *Dempsey*, 261 U. S. 86
Frank v. *Mangrum*, 237 U. S. 309
Snyder v. *Mass.*, 291 U. S. 137

B

The public interest in a trial requires the trial court to protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion or prejudice.

London Guarantee & Accident Co. v. *Woelfle*, 83 Fed. (2d) 325.
Brasfield v. *U. S.* 272 U. S. 310
N. Y. C. RR Co. v. *Johnson*, 279 U. S. 310
Blair v. *U. S.* 241 Fed. 217
Pettine v. *New Mexico*, 201 Fed. 489.
Berger v. *U. S.* 295 U. S. 78
Pearce v. *U. S.* 86 Fed. (2d) 949

C

It was unfair and prejudicial to get before the jury the fact that petitioner's employer was insured and that the insurance carrier made a settlement of the claim for damage to the McDonough truck.

Standridge v. *Martin*, 203 Ala. 486
Kelly v. *State*, 113 Miss. 856

May it Please the Court:

We think this case is squarely within the rule stated by Mr. Justice Roberts in his dissent in *Snyder* v. *Mass.*, 291 U. S. 137, where it is said:

> "Where the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that

a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way."

* * * * * * *

"Procedural due process . . . is not satisfied, though the result is just if the hearing was unfair."

We do not understand that the majority opinion disagreed with Mr. Justice Roberts in the statement of the rule. The difference between the majority and minority was in the application of the rule. In fact as we read the cases the rule has been approved by this court in

Powell v. *Alabama*, 287 U. S. 45.
Moore v. *Dempsey*, 261 U. S. 86.
Frank v. *Mangrum*, 237 U. S. 309.

True, the cases cited were criminal cases, but the nature of the case does not militate against the principle. A party plaintiff or defendant in a civil case is entitled to a fair trial and if he is denied one his constitutional rights have been infringed. The reason is that a trial in court is never a purely private controversy of no importance to the public. The State whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted, and that the verdict of the jury be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by appeals of counsel to passion or prejudice. Where such paramount considerations are involved the failure of counsel to particularize an exception will not preclude an appellate court from correcting the error.

Brasfield vs. *U. S.* 272 U. S. 484.
N. Y. C. RR Co. v. *Johnson*, 279 U. S. 310.

Judge Sanborn in speaking for the Circuit Court of Appeals in *London Guarantee & Accident Co.* v. *Woelfle*, 83 Fed. (2d) 325, at page 340, expressed the idea we are attempting to present in this way:

"Under our system of jurisprudence it is the province of the jury in actions at law to try and determine the rights of parties according to the law and the evidence. It is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a persistent violation of it, is a fatal error, because it makes the trial unfair. * * * A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of a persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client. The trial judge has the power, and in the first instance it is his duty, in the absence of objections by opposing attorneys, to stop and reprimand an attorney who undertakes to indulge in remarks of this nature, and, if possible, to immediately extract from the trial the vice of his obnoxious observations. And if, as is often the case, it is impossible to accomplish this, it is the duty of the court to at once discharge the jury and to direct a new trial. This is primarily the duty of the judge because the conduct of the trial and the task of making it fair and impartial are chiefly intrusted to him, and because it is a delicate and irksome duty for a lawyer to interrupt and censure his opponent in the midst of his argument, a duty from the discharge of which the court should as far as possible relieve him."

We are confident this Court will appreciate the radical departure from the rules of fair play that made it impossible for Trott to have a fair consideration of his case by a jury that had been designedly poisoned to the hilt.

The McDonough Company started out with a flat charge to the jury that Trott recognized that he was negligent and that his negligence caused the damage to the McDonough Company's truck and that he paid the Mc-

Donough Company for the damage to its truck because he recognized that he was responsible for the accident. The McDonough Company must have known that the charge was not true when it was made in the supplemental notice. We say that because:

(1) There is not a scintilla of evidence in the record to support the charge.

(2) The undisputed and unchallenged evidence which was more available to the McDonough Company than it was to Trott, expressly and conclusively refutes the charge.

By this maneuver and under the guise of making good the charge the McDonough Company was able to get before the jury the fact that Trott's employer was insured; that the insurance carrier of Trott's employer had made a settlement of the McDonough Company's claim for damage to its truck; that the insurance carrier of Trott's employer was paying Trott the small sum of $11.70 per week as compensation under the Alabama Compensation Law; that some one paid $500.00 on Trott's hospital bill. All of which were highly prejudicial.

In addition to all of that the evidence showed that the McDonough Motor Company was acquainted with the particulars under which the settlement by the insurance carrier was made, and that Trott was in no way concerned in the said settlement and had no notice of or knowledge of its having been made. He was never consulted about it and neither was his employer. Under such circumstances, we submit, it is impossible for the Court to reach the conclusion that the claim and plea was interposed in good faith. It was advanced, not for the purpose of proving that Trott paid the McDonough Company anything or that he was concerned in any payment to it, but for the purpose of injecting a lot of prejudicial matter into the case under the pretense or guise of attempting to support the plea.

It has been repeatedly ruled by the State courts that it is prejudicial error to get before the jury the fact that a defendant in a personal injury case is insured or that an insurance company is participating in a defense.

Standridge v. *Martin,* 203 Ala. 486.
Kelly v. *State,* 113 Miss. 856.

The same reasoning seems to us to compel the conclusion that it is highly improper for a defendant to get the fact before a jury that a truck driver's employer was insured and the insurance company made a settlement of the case. It would be an impeachment of the legal learning of counsel for defendants to intimate that they did not know that it would be highly improper and reversible error to get the fact that a settlement had been made before the jury unless they could connect Trott with it.

The right to a verdict upon the law and the evidence uninfluenced by extraneous matters is not a mere personal privilege of the litigant but is so interwoven with the public interest that any consent to its violation implied for failure to make proper objection, exception, request for motions in the trial court, does not preclude the protection of that right by the Federal Appellate Court.

N. Y. C. RR Co. v. *Johnson,* 279 U. S. 310.
Blair v. *U. S.* 241 Fed. 217.
Pettine v. *New Mexico,* 201 Fed. 489.

However the Court is not troubled with that question in this case because adequate objection was made, exceptions taken and adequate appeal for redress was made to the trial court, and denied.

The foregoing violation of the fundamental rules of fair play by filing a fake plea that the McDonough Company had no reasonable expectation of proving, was followed by a statement made in open court by its counsel in the presence of the jury, that plaintiff's brother and his employer were sponsoring this law suit in an effort to "unload on this Meridian concern" and get out of pay-

ing compensation to Trott. (Record pp. 228, 229, 306) This statement is wholly unsupported by the evidence. The McDonough Motor Company developed that the Southern Motor Express insured its compensation liability with the Maryland Casualty Company as it was authorized by the law of Alabama to do. The premium on its insurance was based on liability not on what the insurance carrier had to pay. It did not matter a farthing to the Southern Motor Express how much compensation the insurance carrier paid Trott, or whether it paid him anything. The Southern Motor Express washed its hands of the matter entirely when it insured its liability as it was authorized by the Alabama Law to do; and yet Trott's case went to the jury with the statement of influential local counsel on whom the jury had a right to rely that Trott's employer was sponsoring the law suit in an effort to unload on the Meridian concern, meaning the McDonough Motor Company.

Not content with having charged before the jury that Trott had settled with the McDonough Motor Company for the damage to its truck because Trott was conscious that his negligence caused the accident, and that Trott's employer was sponsoring Trott's case in order to unload on this Meridian concern and get out of paying Trott compensation, statements wholly unsupported by any evidence, counsel for the McDonough Motor Company stated in the presence of the jury, that Trott who was claiming and endeavoring to recover a hospital bill of $4,255.00 (Record 327-331) was entitled to have his hospital bill paid without a suit from a fund in Alabama. Counsel then emphasized that statement by stating in the presence of the jury:

> "There is no law in the world whereby a man may collect twice for the same injury."
> (Record, page 307)

And when counsel for Trott arose to expose the falsity of that statement, counsel for the McDonough Company interrupted and said, "We now request that the jury go out."

(Record 307) And the jury retired over plaintiff's objection, (Record 307), without an opportunity for Trott to demonstrate the falsity of that statement. Having injected the maximum amount of poison and prejudice into the case the McDonough Company was diligent in seeing that Trott was afforded no opportunity to in any way counteract or correct the impression the jury received.

Lest it be thought we are overdrawing the picture let the record itself picture the peculiar viciousness of this prejudicial event:

Mrs. Trott, the wife of the plaintiff, was on the stand. On cross-examination by defendants, beginning on page 304 of the record we find the following occurred:

"Cross Examination

By Mr. Snow: (Counsel for McDonough Company)

Q. Mrs. Trott, Mr. Trott receives compensation under the laws of Alabama, does he not?

A. He receives a compensation check.

Q. And he is also entitled under the laws of Alabama to medical treatment, is he not?

A. To do what?

* * * * * * *

Q. Is he not entitled as a part of his compensation to have additional sums with which to pay hospital bills and doctors' bills?

By Mr. B. F. Cameron: (Counsel for Plaintiff)

We object to these questions about compensation if the Court please. There is no pleading of any sort about that, and it has no part in this case. We object to it.

* * * * * * *

By Mr. Snow:

Q. This compensation that you have comes through the Southern Motor Express, your husband's employer, does it not, Mrs. Trott?

A. Now, I don't know anything about this compensation check. All I know, it comes from Atlanta.

By Mr. Snow:

Q. Now as a part of that, and in addition to the weekly stipulation or amount which he gets, there is a medical fund, is there not ma'm?

By Mr. C. B. Cameron: (Counsel for Plaintiff)

We object to that if the Court please, for the reason that any compensation that this young man receives under the law of Alabama is not in bar of any right to his recovery of physical pain and expense from his injury under the law.

By Mr. Snow:

You will recall on yesterday that Mr. Trott was asked in regard to the Southern Motor Express sponsoring this lawsuit to get out of the payments themselves. Now then, this is simply following that up. We have a right to show, when they ask these defendants to compensate them, we have a right to show that he is paid from a fund that he doesn't have to sue for, that is provided through his employer, as compensation to an injured employee, with which to pay this money.

By Mr. C. B. Cameron:

In response to that, we say if the Court please, that the allowance of workmen's compensation in Alabama to this young man for his injuries is not in bar of any right that he has to collect from this defendant for its negligence for his injuries, and doctors' and hospital bills.

By Mr. Snow:

Before your Honor rules, may I make this observation. *There is no law in the world whereby a man may collect twice for the same injury.*

By Mr. Wilkinson: (Counsel for Trott)

If the Court please -

By Mr. Snow: (Interposing)

We now request that the jury go out.

By Mr. C. B. Cameron:

To that we object.

By the Court:

Let the jury go to the room. The Court requests that the jury go to the room.

(At this point the jury retire from the hearing of the Court and the following proceedings were held in the absence of and out of the hearing of the jury:)

* * * * * * *

By Mr. B. F. Cameron:

I want to say this, if the Court please, counsel has made a statement here in the presence of the jury that this man is entitled to have his hospital bill paid without suit. Now that isn't true, and isn't within a thousand miles of the truth. I think the only fair thing would be to put counsel on the stand or have him retract the statement before the jury, or have your Honor to make some appropriate statement.

* * * * * * *

Here is why I wanted the jury to go out. I think, gentlemen, *this doctor's bill has gotten before the jury where it isn't right. There ought to be some explanation made of it.* I say that to both sides. These statements that you lawyers are making that the doctor's bill is to be paid, if that is true, all right; if it isn't true, the jury ought to know it.

By Mr. Wilkinson:

It isn't true.

By the Court:

And let's quit making those statements, gentlemen. The lawyers, all of you, know that that isn't competent to state those things before a jury, and let's try this case like a lawsuit.

* * * * * * *

By Mr. Wilkinson:

May I read this statute to your Honor, Section 7567 of the Code of Alabama? (Section 7567 read.)

By Mr. B. F. Cameron:

I say that the statement has been made by counsel in the presence of the jury that there is a fund by which this man can have his doctor's bill paid without a lawsuit. Now the jury has that, and thereupon the jury retired, and we have some proceedings here, and that it is unchallenged. That jury

can never get that out of its mind. Now that is not the truth. The statement was made and objected to, but it is in the record before the jury, and it is utterly poison, and some way ought to be found within the realm or precedure to correct it, but I don't know how it can be done.

But I ask counsel - $500.00 has been paid and is shown on here. As far as we know that is all in the world that can ever be paid, and I have asked counsel here if he will correct that impression. I am sure he wants to be fair about the thing, and I do think some statement ought to be made by your Honor or by counsel that will disabuse the jury's mind as to that, because here is a bill that runs to over four thousand dollars.

By the Court:

You mean $500.00 has been paid?

By Mr. Cameron:

Has been paid.

By the Court:

And it leaves that much?

By Mr. Cameron:

$4,255.00.

By the Court:

After that has been paid?

By Mr. Cameron:

Yes, here is the itemized statement.

By the Court:

I am sure the attorneys on the other side want to be perfectly honest about it. *That is why I let the jury go to the room to decide some way to correct that error between you lawyers by agreement, if you can.*

* * * * * * *

By Mr. C. B. Cameron:

We want the statement retracted that counsel made in the presence of the jury.

By Mr. Wilkinson:

I suggest the Court has the right to state to the Jury he has consulted the Alabama Statute, and the Alabama statute provides a hundred dollars and no more.

By the Court:

I don't think the Court has that right in this state. If I did it and you got a verdict, it would be reversed. I think though that you attorneys have a right to explain it.

* * * * * * *

By Mr. B. F. Cameron:

** * * Still, that will not cure the fact that counsel states definitely that there is a way to get this without suit, and leaving the very clear impression with the jury that this is a put up job here to make somebody else pay when there is an easy way to get it.*

* * * * * * *

By Mr. B. F. Cameron:

I don't know any way it will be handled unless counsel will voluntarily correct the statement.

By the Court:

I don't either. You are big enough lawyers to correct this thing.

* * * * * * *

(At this point the jury return into open court, and the following proceedings were had in the presence of and within the hearing of the jury:)

By Mr. Snow:

Q. Mrs. Trott, there has been five hundred dollars paid to the hospital by the people who pay the compensation, already, has it not been?

A. Well, there is $500.00 been paid, but who paid it I do not know.

Q. You don't know who paid it?

A. No, I don't.

Q. But you do know that neither you nor Mr. Trott paid it?

A. That's right."

When the trial court would not protect Trott he was forced, in an effort to protect himself, to put a witness on the stand to testify to facts contrary to the statement made by counsel in the presence of the jury. The McDonough Company in that way injected a false issue into the case

and the trial court kept that issue in it, and left it to the jury to accept or reject the statement of the witness as they saw fit, although counsel who made the false statement was not sworn or allowed to be cross-examined by Trott.

It was, of course, highly improper to state that Trott could get his hospital bill in Alabama without suit when such was not the case, particularly in view of the fact that Trott was attempting to recover a hospital bill in excess of four thousand dollars. It was a charge that Trott was perpetrating a fraud. It was a charge that Trott was not dealing fairly but was attempting to impose upon the McDonough Company. It was a charge that Trott would not voluntarily accept money from an alleged fund with which to settle his hospital bill, but preferred to collect it from the McDonough Company by law suit. The jury understood that. They had a right to accept as true the statement of influential local counsel to that effect. This is not a case in which there was an inadvertent overstepping of rules. It is a case in which there were multiple transgressions that could not be condoned if every Court in Christendom held that the McDonough Motor Company was entitled to a directed verdict, which obviously it was not. It is not a case where the conduct was slight or confined to a single incident, but one where the misconduct was pronounced and persistent with a probably cumulative effect upon the jury, and so diabolical that even the trial court admitted its inability to deal with it. In *Pearce* v. *United States,* 86 Fed. (2d) 949:

> "Indulgence was designed rather than inadvertent, and an improper purpose its only explanation. That it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so. * * * Above and beyond all technical procedural rules designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as

> fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the government itself be there a litigant.

To like effect is *Berger* v. *United States*, 295 U. S. 78.

The prime reason why a judgment obtained by the misconduct of counsel in stating and commenting on facts not in evidence and not deducible from the evidence in the case, must be set aside, is that the misconduct deprives the defeated litigant of that fair and impartial trial to which of right every litigant is entitled. We take it it requires no citation of authorities to convince this court that a trial is not fair in a legal sense when counsel makes statements to the jury of matters or facts not testified to by any witness and neither admitted nor admissible in evidence. This for the reason that it is not only giving testimony unsanctioned by an oath, but testimony not subject to the test of cross-examination, and testimony which the aggrieved litigant has but little, if any, opportunity to refute by contradictory or explanatory proof.

The record in this case very clearly shows that the McDonough Company was willing to go to any lengths, take any chance, in order to gain a verdict in what it believed was a dangerous case. It tried the case on the theory of winning the initial round by fair means or foul, on the theory that the pauperized plaintiff would probably be unable to get his case before an appellate court, and strange to say, the Supreme Court of the State of Mississippi approved the procedure of getting a verdict by fair means or foul and solemnly refused to interfere, because it was of the opinion - contrary to the opinion of the minority of the jury who saw and heard the witnesses in the case - that the verdict of the majority of the jury on the merits was correct.

We respectfully ask this court to grant the writ of certiorari in this case and to put litigants, the profession and the lower courts on notice that a litigant will not be permitted to enjoy a victory won at any expense and by unconstitutional procedure.

Respectfully submitted,

HORACE C. WILKINSON,
Counsel for Petitioner.